United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON - WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation, Plaintiff in Error, vs. PRESTON ROYER, Defendant in Error.	No. 3203.

OREGON - WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation, Plaintiff in Error, vs. W. J. WASSON and MABEL WASSON, Defendants in Error.	No. 3204.

Brief of Defendant in Error

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Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division.

STATEMENT OF THE CASE

As stated by counsel for the plaintiff in error, "the paramount question involved in these cases is whether or not Spring Creek is a natural water

course." This stream has its origin in Rattlesnake Hills, whence it flows in a general southerly direction some fifteen miles to the Yakima River (Tr. Wasson case, pp. 19-20.) It and its numerous confluents drain between twenty and twenty-five thousand acres; and while it is true that throughout its course in the hill country it flows in canyons or gullies, yet it is equally true that from the time it enters upon the flat country above the defendant's right of way until it empties into the Yakima River —a distance of some three miles or more—it flows in a well-defined if crooked and irregular channel (Tr. Wasson case, pp. 20-23.) "The channel is not regular—in places good and wide and other places deep. It is about four to eight feet at the bottom, the depth being irregular." (Testimony of Mason, Tr. Wasson case, p. 23.)

This stream does not run constantly throughout the year, but this is characteristic of the great majority of smaller water courses in similarly arid country. Nevertheless "Spring Creek runs practically every year when there are good crops and in dry seasons does not run at all. In 1907 the water down Spring Creek went through a twenty-four foot breach practically four feet deep. There is no outlet other than under the O. W. R. & N. crossing. From 1906 to 1912 there was water in more or less volume running each season. This water flows to the Yakima River and the only outlet is under the O. W. R. & N. tracks." (Testimony of Royer, Tr. Wasson case, p. 22.)

Moreover, and perhaps more illuminative of the true character of the stream, Mr. Royer on being recalled further testified as follows:

> "The banks of Spring Creek vary, being well defined for probably fourteen miles above Mr. Starkey's place, there are distinct channels and have to be bridged; they expect water in these and they put in bridges." (Tr. Wasson case, p. 25.)

Nor are the plaintiffs (to use the nomenclature adopted by counsel for the plaintiffs in error) alone in applying to their descriptions of Spring Creek terms strictly applicable to natural water courses only. The defendant's engineer refers repeatedly to the channel of Spring Creek, and testifies that "the water came down in such volume that the *original channel* was so small as to be unable to carry the water." (Tr. Wasson case, pp. 40-41); and finally admits that after making inquiry from local residents as to the flowage of water down Spring Creek, that he made an independent investigation by going practically to the foot of the main Rattlesnake Hills, where he discovered three branches uniting with Spring Creek, and as a result he figured that twenty second-feet would be the flow of water in this stream.

The damage complained of and for which jury returned verdicts for Royer in the sum of $850.00 and for the Wassons in the sum of $1000.00, resulted strictly as alleged in the complaints. The defendant's railway crosses Spring Creek on an

embankment about eight feet high, and at a point approximately one-quarter of a mile east of the lands of the plaintiffs. The culvert installed by the defendant in the bed of Spring Creek proved insufficient to carry off the waters which commenced to flow about January 22d, 1916, and overran the lands in question on January 23d and again on February 10th. These waters being deprived of their natural outlet, were impounded by the defendant's embankment and followed along that embankment from the bed of Spring Creek towards the east some thirteen hundred feet, where they broke through the railroad track and washed down over the lands of the plaintiffs herein until they rejoined the natural channel of Spring Creek near the southern limits of section 28. (Testimony of Royer, Tr. Wasson case, pp. 25-26.)

Upon these facts the plaintiffs contend:

I

That Spring Creek is a natural water course.

II

That assuming the waters which did the damage complained of to be surface waters only, the defendant had no right to impound them and cast them upon the lands of the plaintiffs in increased and concentrated volume to the damage of said lands.

III

That the volume of water which resulted in the flooding of the plaintiff's lands was not due to any extraordinary and unexpected flood.

IV

That there is no claim of estoppel available to the defendant against the plaintiffs herein; and

V

That the defendant failed to preserve any sufficient exceptions to the instructions given by the court.

POINTS AND AUTHORITIES

I

Federal courts follow the local law in determining what constitutes a water course.

Chicago, B. & Q. R. Co. v. Board of Supervisors, 182 Fed. 291, 31 L. R. A. (n. s.) 1117.

Walker v. New Mexico & S. P. Ry. Co., 165 U. S. 593, 41 L. Ed. 837.

II

Spring Creek is a natural water course.

(a) A stream's origin in melting snow or rain does not make it surface water.

Chicago, R. I. & P. R. Co. v. Groves, 20 Okla. 101, 93 Pac. 755, 22 L. R. A. (n. s.) 802.

McClure v. Red Wing, 28 Minn. 186, 9 N. W. 767.

Missouri Pac. R. Co. v. Wren, 10 Kas. App. 408, 62 Pac. 7.

Gibbs v. Williams, 25 Kas. 241, 37 Am. Rep. 241.

Simmons v. Winters, 21 Ore. 35, 27 Pac. 7.

Borman v. Blackmon, 118 Pac. 848.

Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114.

Weideroder v. Mace, 111 N. E. 5.
Gould on Waters, Section 264.

(b) To be a natural water course it is not essential that the flow be continuous throughout the year.

Dahlgren v. Chicago, Milwaukee & P. S. Railroad Co., 85 Wash. 395.
Vandalia R. Co. v. Yeager, 110 N. E. 230.
Trout v. Woodard, 114 N. E. 467.
Missouri Pacific R. Co. v. Wren, 10 Kas. App. 408, 62 Pac. 7.
Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. 239, 22 L. R. A. 45.
Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. 98.
Jaquez Ditch Co. v. Garcia, 124 Pac. 891.
Simmons v. Winters, 21 Ore. 35, 27 Pac. 7.
Borman v. Blackmon, 118 Pac. 848.

(c) Surface waters are waters of a casual or vagrant character, having a temporary source, and which diffuse themselves over the surface of the ground following no definite course or defined channel.

Dahlgren v. Chicago, Milwaukee & P. S. Railroad Co., 85 Wash. 395.
1 Kinney, Irrigation and Water Rights, Section 318.
Miller v. Eastern Railroad & Lumber Co., 84 Wash. 31.

Harvey v. Northern Pacific Railroad Co., 63 Wash. 669.

III

The owner of higher land may not concentrate at one point surface water and discharge it in a mass upon the lower land.

Peters v. Lewis, 28 Wash. 366.
Noyes v. Cosselman, 29 Wash. 635.
Sullivan v. Johnson, 30 Wash. 72.
Holloway v. Geck, 92 Wash. 153.
Trigg v. Timmerman, 90 Wash. 678, L. R. A. 1916 F, 424.
Rohsnagel v. Northern Pac. R. Co., 69 Wash. 243.
Wood v. Tacoma, 66 Wash. at p. 270 and cases there cited.
Kroeger v. Twin Buttes R. Co., 127 Pac. 735.
Keifer v. Shambaugh, 157 N. W. 634.
Gulf Sea & S. F. R. Co. v. Richardson, 141 Pac. 1107.
Case Note, 12 L. R. A. N. S. p. 680.

IV

Negligence is not a necessary element of the wrong for which damages are claimed by the plaintiffs.

Dahlgren v. Chicago, Milwaukee & P. S. Railroad Co., 85 Wash. 395.

V

The jury's finding is conclusive that the flow of water complained of was only that "which might ordinarily be expected to flow through the water course in question."

No motion for new trial having been made, and no proper exceptions having been taken, the jury's findings settle the facts of the case.

Mason v. Smith, 191 Fed. 503, 112 C. C. A. 146.

Lehnen v. Dickson, 146 U. S. 73, 37 L. Ed. 373.

Aetna Life Ins. Co. v. Ward, 140 U. S. 76, 35 L. Ed. 371.

Transit Development Co. v. Cheutham Co. 194 Fed. 963.

J. W. Bishop Co. v. Shelhorse, 72 C. C. A. 337, 141 Fed. 643.

Hamilton v. Loeb, 108 C. C. A. 108, 186 Fed. 7.

VI.

There is no estoppel operative against the plaintiffs.

(a) Failure to plead an estoppel operates as a waiver of it.

Olson v. Springer, 60 Wash. 77.

Haefel v. Brackett, 95 Wash. 625.
Jacobs v. First Natl. Bank, 15 Wash. 358.
Huggins v. Milwaukee Brewing Co., 10 Wash. 579.
Walker v. Baxter, 6 Wash. 244.
10 Cyc. 813.
10 R. C. L. 842.

(b) The maxim is *volenti non fit injuria*, not *scienti non fit injuria.*

Drown v. New England Tel. & Tel. Co., 66 Atl. 801, at 804.

Choctaw R. Co. v. Jones, 92 S. W. 242.

VII.

A single exception to a part of a charge which embraces more than one proposition of law is not sufficient to sustain a writ of error.

Union Pacific Railroad Co. v. Thomas, 152 Fed. 372.
Chicago R. I. & Pacific Ry. Co. v. Hall, 176 Fed. 75.
City of Charlotte v. Atlantic Bitulithic Co., 228 Fed. 456.
Simkins Federal Suit at Law, pp. 114 & 116 and cases there cited.

ARGUMENT

This case comes to this court upon six assignments of error; five of which, being the principal ones, relate to instructions requested and refused or to portions of the instructions actually given. They in reality present but two questions for the consideration of this court; namely, was the damage to the plaintiffs occasioned by the obstruction of a natural water course, or was it occasioned by the impounding of surface waters and the casting of them in a concentrated volume upon and across the plaintiffs' lands.

Defendant, however, argues a number of subsidiary points, which, although we do not believe they are properly before this court, shall be first briefly discussed.

Defendant contends "that the flowage of water on the lands of plaintiffs was not caused by any negligence of defendant." (See Contentions of Defendant, Brief p. 5.) The defendant did not request the court to charge the jury that the damage for which a recovery might be had must be attributable to the negligence of the defendant, and the failure of the court to charge the jury in this particular is ordinarily to be remedied by a request for further instructions. However, the court properly eliminated negligence from its instructions; for, as said by the supreme court of the state of Washington in *Dahlgren v. Chicago, Milwaukee &*

Puget Sound Railroad Co., 85 Wash. 395—a case to which reference will be hereafter frequently made:

> "A second contention is that the instruction erroneously eliminated negligence as an element of the wrong of which complaint is made. But if it be meant by this that it was necessary for the respondent to show, in addition to the fact that the construction of the embankment caused them an injury, that the work of construction was performed in a negligent manner, we cannot agree with the contention. It is doubtless true, as the appellant argues, that it had a lawful right to construct an embankment for the use of its railway, but it does not follow that it had a lawful right to construct it in such a manner as to cause injury to the property of the respondents. It is not a case of *damnum absque injuria.* On the contrary, if the embankment impeded a natural water course, and left no sufficient vent for the escape of the water, and the water was caused thereby to overflow the premises of the respondents to their injury, the construction was negligent and wrongful as to the respondents, no matter how carefully the work of construction was performed."

The defendant next contends that the plaintiffs acquiesced in the construction of the embankment and in the maintenance thereof, and thereby either assumed the risk of injury therefrom or are estopped to claim damages resulting. (See Contentions of Defendant, Brief p. 5, and pp. 23 to 29, inc.) So far as the claim of estoppel is concerned, we

believe it to be established beyond question that it is a special defense, and the failure to plead it operates as a waiver. There is no claim made that any such defense was plead or attempted to be plead; but counsel for defendant urges that the maxim "*volenti non fit injuria*" applies. It is apparent and conceded on all sides that the embankment which constituted the railroad grade across Spring Creek was constructed by the defendant upon its own right of way and as it had a lawful right to do, with the exception of the provision it made for the passage of the waters of Spring Creek. There is nothing in either complaint, and no syllable of the testimony to indicate that the plaintiffs or either of them participated in the construction or reconstruction of this grade or embankment. Conceding that they knew of its construction and that when it was last reconstructed they further knew that the forty-eight-inch culvert had previously proved insufficient, it is to be remembered that the maxim is *volenti non fit injuria*, not *scienti non fit injuria*. The maxim itself contemplates an active participation in the doing of the act or the accomplishment of the thing which is later sought to be complained of; and the cases cited by counsel for defendant corroborate this position. The person to whom the maxim is applicable is one who remains silent although under a duty to speak, or by some act or declaration "recognizes the wrong as an existing and valid transaction and in some degree at least gives it effect so as to benefit him-

self or so as to affect the rights or relations created by it between the wrong doer and a third person." Neither of the plaintiffs participated so far as the record in this case is concerned in the construction of this embankment. Neither of them was ever under any duty to the defendant to prescribe the character of embankment that should be built; and neither of them has at any time recognized the wrong as an existing and valid transaction.

Again the defendant contends that the injury was the result solely of an extraordinary and unexpected flood, and that the damage sustained was therefore *damnum absque injuria.* (See Contentions of Defendant, Brief p. 5.) However, the court expressly charged the jury:

> "Of course, the railroad company had a lawful right to construct its roadbed along its right of way, together with the right to make all necessary cuts and fills, but where such roadbed crossed a natural watercourse the company was bound to construct a culvert or make other adequate provision to permit of the passage of the waters flowing down the stream at times of all ordinary freshets, *but was not bound to anticipate or provide against unprecedented or unexpected floods.*
>
> "The first question for your consideration, therefore, is, did the company in the present instance make adequate provision for the free passage of all water *which might ordinarily be expected to flow* through the watercourse in question? If it did not, and

such failure on its part was the direct and proximate cause of the injury to the property of the plaintiffs, real or personal, the plaintiffs are entitled to a verdict at your hands." (Tr. Wasson case, pp. 52 & 53, Italics ours.)

It is evident, therefore, from the jury's findings in favor of the plaintiffs that they found that this volume of water did not result from an unprecedented or unexpected flood, but was such volume as might ordinarily be expected to flow through Spring Creek. Defendants, moreover, preserved no exception to this finding, and both they and this court are bound by it.

A discussion of the requested instructions which were refused by the court cannot be separated from that dealing with the concrete question as to whether or not Spring Creek is a natural water course, and the second question involved in this appeal whether the defendant caused surface waters impounded by it to be released in concentrated volume upon the plaintiffs' lands to their material damage; but the defendant's exceptions to the portions of the charge given are insufficient because those particular portions of the charge involve and state more than one proposition of law, and one of those propositions, at least, is correct. At any rate it does not lie in the mouth of defendant to urge the contrary as it itself requested the court to charge the jury in practically the identical language used. (Compare defendant's requested instruction 2, Tr. Wasson case, p. 50, with the second paragraph of the in-

structions given by the court, Tr. Wasson case, pp. 52 & 53.)

In the Dahlgren case, 85 Wash. 395, the court instructed the jury as follows:

> "In this connection you are instructed that any drain provided by the defendant to take care of the waters of the stream, if you shall find there was one, as above, must have been sufficient to take care of and dispose of the waters flowing down the stream at times of any ordinary freshet, but need not have been sufficient to provide against any unprecedented flow of high water."

This instruction was objected to upon the ground that it invaded the province of the jury. The supreme court of Washington answered this objection as follows:

> "But clearly the court here determined no question of fact. It but stated the measure of duty the law imposed upon the appellant with regard to the drain. And we think it correctly stated the rule. If it has fault at all, the fault lies in the fact that it is not sufficiently full to cover the entire evidence on the particular subject. But the remedy for this defect is to ask for further instructions, not to object to the instruction given."

Spring Creek is a natural water course.

The time available to us for the preparation of

this brief has not sufficed for a minute consideration of the vast number of cases cited on behalf of the defendant. It is apparent, however, that many of them are early decisions, and that the great majority of them are from states differing wholly in the natural conditions as to rainfall and waters from those found in Benton County, Washington. To all of these early decisions, Chief Justice Beasley in *Bowlsby v. Speer*, 31 N. J. L. 351, 353, 86 Am. Dec. 216, suggested an exception in these words:

> "How far it may be necessary to modify this general proposition in cases in which, in a hilly region, from the natural formation of the surface of the ground, large quantities of water, in times of excessive rains or from the melting of heavy snows, are forced to seek a channel through gorges or narrow valleys, will probably require consideration when the facts of the case shall present the question."

That exception has been now many times considered and has become as well established as the original rule; so well established indeed that argument in aid thereof must be a superfluity. We purpose therefore merely to call this court's attention to what we believe to be the more modern definitions of a water course, and to point out their applicability to the facts of this case.

The Dahlgren case, 85 Wash. 395, was brought to recover damages for the alleged wrongful obstruction of a water course, causing injury to the

plaintiff's real property, which was bottom land sloping slightly to the southwest. West and northwest of it is a hill "which for a considerable distance from the property gathers drainage waters which flow in a natural channel or gully at the base of the hill, making a flowing stream throughout the year except in the driest months." In holding this stream a natural water course, and incidentally in passing upon the sufficiency of the pleadings in that particular, the supreme court said:

> "Surface waters, in a technical sense, are waters of a casual or vagrant character having a temporary source, and which diffuse themselves over the surface of the ground, following no definite course or defined channel, while here the waters are described as coming from the vicinity of a large area to the north of the respondents' premises and flowing naturally and without hindrance through a natural water course and channel which crossed such premises. The description is that of a natural and regular water course, rather than that of a mere casual overflow. * * * But if the pleadings be obscure on the particular question, the testimony introduced thereunder without objection was nqot so. The testimony showed a stream flowing in a well defined channel, continuous for some nine months of the year, and that it was this particular channel that the appellant closed to the injury of the respondents. Where evidence is introduced without objection, the court may properly base its instructions thereon, even though the evi-

dence be broader than the pleadings." (Opinion, p. 405.)

Again, and notwithstanding the decision in *Robinson v. Shanks*, 118 Ind. 125, (Appellant's Brief, p. 32), the appellat ecourt of that state in the recent case of *Vandalia Railroad Co. v. Yeager*, 60 Ind. App. 118, defined a water course as follows:

> "An origin from rains and melting snow is by no means an infallible guide in determining that a certain flow of water is mere surface water that may be damned with impunity. The Supreme Court states the following as the true rule:
>
> " 'If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large boies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural water course.' *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114."

And following upon that decision, the supreme court of Indiana, in *Weideroder v. Mace*, 184 Ind. 242, 111 N. E. 5, held that language of an answer as follows:

> "that the face of the country in the vicinity of appellant's said land is such as

> necessarily collects on said land in one body, so large a body of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some reservoir; that such water is now and has been from time to time immemorial regularly discharged through a 'well-defined channel' which the force of the water has made for it."

described a natural water course.

The standard definition of "water course" in Oregon is to be found in *Simmons v. Winters*, 21 Ore. 35, 27 Pac. 7, quoted with approval in the recent case of *Borman v. Blackmon*, 60 Ore. 304, 118 Pac. 848, as follows:

> " 'That a water course is a stream of water usually flowing in a particular direction, with well-defined banks and channel, but that the water need not flow continuously—the channel may sometimes be dry; that the term "water course" does not include water descending from the hills down the hollows and ravines, without any definite channel, only in times of rain and melting snow, but that, where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long, deep gullies or ravines upon the lands below, and in its onward flow carves out a distinct and well-defined channel, which even to the casual glance bears the unmistakable impress of the frequent action of running water, and through which it has flowed

from time immemorial, such a stream is to be considered a water course and to be governed by the same rules.' "

We believe it must be apparent that these definitions fit the case now before the court, for here the face of the country is such that there is necessarily collected in the Rattlesnake Hills a large quantity of water which for years past has irresistibly sought an outlet for itself until it has made a well-defined channel in which water is expected to flow and which is bridged wherever the roads of the vicinity have occasion to cross it. We desire, however, to call the court's attention particularly to two other cases in this connection; namely, *Jaquez Ditch Co.* v. *Garcia,* 124 Pac. 891, and *Kroeger* v. *Twin Buttes Railroad Co.,* 127 Pac. 735. In the first case the supreme court of New Mexico examines a large number of definitions of natural water course as promulgated by the various states of the Union; and then after remarking that "the only case that seems to be in conflict with these definitions is the case of *Walker* v. *New Mexico & Sourthern Pacific R. Co.,* 165 U. S. 593, 14 Lawyers Edition 837," (cited in defendant's brief, pp. 31, 39-40), proceeds to distinguish that case in the following language:

"But a careful examination of this case (the Walker case) shows that the obstruction or embankment complained of was four miles from the mouths of the arroyo, and that the water after leaving the arroyo

> spread out, and became surface or flood water. It is obvious that this case rests on a different state of facts, and it appears from the evidence that the arroyo in question came out of the hills in a well-defined channel a few rods from where the obstruction was erected."

So in the present case, although the point where the defendant's embankment crossed the channel of Spring Creek was several miles from where that creek emerged from the hills, nevertheless throughout that distance the creek flowed in a well-defined channel to which its waters were wholly confined except where they were spread out by the government's dam and that made by Mr. Starkey; but that even then, they came together again and before reaching the defendant's track once more flowed in a single well-defined channel. (Testimony of Williams, Defendant's Engineer, Tr. Wasson case, pp. 40-41.)

The second of the two cases last above cited is important in that it points out another ground of distinction from the Walker case in this, that in the Walker case the waters passed over the plaintiff's land in their natural flow and fall and were then dammed by the defendant's embankment and thereby cast back from the defendant's lower lands onto the plaintiff's higher lands. "The Walker case was dealing with surface water flowing from plaintiff's lands onto defendant's lands;" while in the Kroeger case, as well as in the instant case,

the waters complained of were cast from the defendant's lands onto the plaintiff's lands over which in their natural state they were not accustomed to flow.

Defendant in collecting the water behind its embankment, and discharging it in a concentrated body upon the lands of the plaintiffs to their damage, became liable to them for such damage.

The foregoing statement is of a rule so firmly established in the United States, and particularly in the state of Washington, that we do not believe it will be contested. It applies equally to the obstruction of a natural water course as to the impounding of surface water; and that it is applicable to the facts here must be apparent. The waters of Spring Creek, unable to follow their natural and accustomed channel, were dammed back by the railroad company's embankment on its right of way and followed the slight grade toward the east down a borrow pit until they reached a point on the lands of the plaintiff Wasson where they broke through the defendant's grade, washing away the roadbed and across the plaintiff's land. The exhibits in the case clearly point out the course the waters took and their discharge in destructive concentration upon the plaintiff's fields.

The supreme court of Washington in the early case of *Peters* v. *Lewis*, 28 Wash. 366, 68 Pac.

869, adopted the rule hereinabove stated in this language:

> "When surface water is collected and discharged upon adjoining lands in quantities greater than or in a manner different from the natural flow, a liability accrues for the injury occasioned thereby."

This general rule has been applied in varying circumstances in the long line of cases hereinabove cited.

Thus in *Noyes* v. *Cosselman*, 29 Wash. 635, 70 Pac. 61, the plaintiffs brought an action to restrain the defendants from digging a ditch whereby the waters resulting from rains and melted snows, which commonly accumulated in a natural depression on their lands, should be drained off and cast upon plaintiffs' lands. The lower court found for the plaintiffs, issued the injunction, and the defendants appealed, placing their main reliance upon the case of *Cass* v. *Dicks*, 14 Wash. 75, 44 Pac. 113, which case is likewise one of the main props of the defendant's argument (See Brief, pp. 9-10, 31.) The supreme court of Washington in commenting upon that case says that it "was a case where lands lying along a river were subject to inundation at times of high water unless protected by means of dikes. The defendants in that case were lower proprietors, and were proceeding to erect a large dike for the purpose of preventing their lands from being flooded during ex-

traordinary freshets. The plaintiffs brought the action to restrain the erection of the dikes upon the ground that the same would prevent the seepage, surface water, and overflow from flowing from their premises, as it was accustomed to do, and thus destroy their crops and render their farm valueless."

Continuing, and still referring to that case, the court further said:

> "It was therefore held that the lower proprietor had a right to construct the dike in order to protect his own land. And it is argued in this case that the appellants here have a right to drain the water which accumulates in Long Lake from rains and melting snows through an artificial ditch built for that purpose through a natural barrier upon their own land, and cast the same upon lower lands of their own, from whence it is cast upon respondents' lands, and that the damage thus caused to respondents is *damnum absque injuria;* that the only remedy of respondents is to dike against the flow of water, and thereby keep it upon the lands of appellants, or to construct ditches to carry off the increased water. If the position of appellants that respondents may dike against the water thus turned upon them is correct, under the rule announced in *Cass* v. *Dicks*, *supra*, still we do not think it necessarily follows that the appellants may by artificial means turn the water from Long Lake upon other parts of their own lands, to the injury of respondents. The rule that an owner of land

> has no right to rid his land of surface water by collecting it in artificial channels, and discharging it upon the land of an adjoining proprietor, to his injury, is followed alike in the states which have adopted the common law as well as those which have adopted the rule of the civil law." (Citing cases.)

In *Rohsnagel* v. *Northern Pacific Railroad Co.*, the plaintiffs sought to recover damages from the defendant railway company under allegations showing that the defendant company's roadbed where it passed plaintiff's lands was upon a solid embankment from four to eight feet above the natural level of the ground, so that in times of flood the waters of the Snohomish river, which flowed on the opposite side of this roadbed from the plaintiffs' land, were from two to three feet above the level of the plaintiffs' ground. In November, 1906, the defendant's roadbed was washed out at a point immediately opposite plaintiffs' land; and following upon that, the defendant installed a culvert at the place where the washout had occurred, with the result that during each succeeding annual high water after the installation of this culvert, the water impounded by the defendant's embankment was forced through this culvert and discharged upon the lands of the plaintiffs to their damage in the sum of six thousand dollars. To this complaint a demurrer was sustained upon the case of *Harvey* v. *Northern Pacific Railway Co.*, cited in defendant's brief, page 31.

The supreme court held this action to be erroneous, and reversed the lower court. The supreme court, after pointing out the true nature of the Harvey case, proceeds with its opinion as follows:

> "In this action, the surface water does not meet the embankment and then proceed with the natural course of the stream, but respondent has collected the water on its right of way and has discharged it upon appellants' land through a culvert constructed for that purpose. It has not raised its own premises for the sole purpose of diking against and preventing the flow of surface water thereon, but has also created a new, unnatural, and destructive current through its embankment, to appellants' damage. In the *Harvey* case, we observed that, as a result of the embankment there constructed, the surface water was returned to the stream; that all the defendant did was to protect its property from overflow water which would otherwise leave the natural channel of the stream. To construct the embankment and thereby raise the water to an unnatural height on respondent's right of way, and then force it through the culvert upon appellants' land with de-destructive force and in a larger volume that its natural flow, is not a protection of respondent's right of way from surface water, as held in the *Harvey* case; but is an attempt to control and dispose of the water in a manner to suit the respondent's pleasure and convenience without returning it to the stream and without regard to appellants' rights. A property owner can-

not gather surface water on his land, discharge it in an unusual volume and with excessive force through an artificial ditch or culvert upon the land of another, and then be relieved from liability on the theory that the injury resulting to his neighbor is *damnum absque injuria.* Gould, Waters (3d ed.), 271; *Peters* v. *Lewis*, 28 Wash. 366, 68 Pac. 869; *Livingston* v. *McDonald*, 21 Iowa 160, 89 Am. Dec. 563."

A continued citation of authority would be a work of supererogation. This court is bound in passing upon the issues presented to apply the law as laid down by the supreme court of the state of Washington. That court has in no uncertain terms, in cases presenting facts so nearly identical with those of the instant cases as to be wholly indistinguishable from them so far as the legal principles which are to be applied are concerned, enunciated the rules hereinbefore set out. Those rules were with his usual force and clarity of expression adopted and applied by the Honorable Judge Rudkin in the trial of these cases. We therefore respectfully submit that no error has been committed and that the judgments should be affirmed.

Respectfully submitted,

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